Testimony of

Gary W. Spitzer

Vice President/General Manager DuPont Chemical Solutions Enterprise
E. I. du Pont de Nemours and Company
1007 Market Street
Wilmington, DE 19898
302-774-1000

Before the
House Transportation
And Infrastructure Committee

"Rail Competition and Service"

September 25, 2007

Chairman Oberstar and distinguished Members of the Committee, my name is Gary Spitzer. I am the Vice President and General Manager for DuPont Chemical Solutions Enterprise. In this role, I lead a global business in a segment of our company. DuPont provides products and services to a large number of markets including agricultural products, construction, industrial chemicals, energy, manufacturing, health care, transportation, and homeland security. Thank you for this opportunity to speak today.

A competitive and efficient rail distribution system is vital to DuPont and its absence is adversely affecting our ability to operate in the United States and compete in the global market. I am here to explain why DuPont and other similar companies consider enactment of H.R. 2125, the Rail Competition and Service Improvement Act of 2007, critical to our great Nation's economic growth. DuPont also supports legislation such as H.R. 1650, which would subject the railroads to the same antitrust provisions that govern the conduct of other participants in the free enterprise system.

DuPont is a global corporation founded 205 years ago on the banks of the Brandywine River in Wilmington, Delaware. Initially, DuPont made only one product, black powder. A century later, its focus shifted to chemicals, materials and energy. In our third century, we are bringing together biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, and other sustainable solutions to enable a better, safer and healthier life for people everywhere. DuPont has revenues of over $27 billion a year, with 135 manufacturing and processing sites in 70 countries and over 60,000 employees. In the United States alone, DuPont employs about 36,000 workers in 33 states.

One thing has remained unchanged throughout the history of DuPont – our uncompromising commitment to safety. Our Company's founder, E. I. du Pont, built safety into the very fabric of DuPont culture by living, and requiring managers to live, on the Company's first manufacturing sites. That culture and clear personal accountability remain just as strong today. Safety forms the foundation for every system and process, including transportation, in DuPont. Indeed, our safety culture has been the underpinning for many DuPont products through the years. Our discovery of nylon, for example, made safer parachutes for D-Day, and our development of Neoprene®, a synthetic rubber, made military transportation easier and safer. Today, products such as DuPont Kevlar® high-performance fiber, which is credited with the survival of over 3,000 law enforcement officers in the United States over the last thirty years, help save lives. In addition to being used for body armor, Kevlar® is used for vehicle armor, for aircraft parts, bridge construction, fiber optic cable and numerous other functions. Another DuPont fiber, Nomex®, is used for personal protection by first responders, including firefighters. Our Sentry-glass® technology helps to protect both private citizens in skyscrapers and other structures around the world and government employees at critical governmental installations such as the Pentagon and U.S. Embassies.

America's freight trains have been vital to DuPont operations since 1858 when the Pennsylvania Railroad first transported our products. They remain essential to our business today. To produce Kevlar®, Nomex® and many of our other products, DuPont requires a vast array of chemicals, some regulated by the Department of Transportation (DOT) and some not. Quite often, due to their composition, characteristics or volume, these chemicals must be transported by rail. Therefore, a safe, efficient, cost-effective, and responsive rail transportation system is critical to my business, the majority of businesses within DuPont, and our country's manufacturing community as a whole. Without such a system, we run the risk of no longer being able to manufacture some products within the United States, provide jobs to your constituents, or contribute exports to help balance our Nation's trade deficit.

Our Nation's defense, international trade and domestic economy are also largely dependent on a safe, financially healthy and efficient, domestic rail system. Our economy requires carriers, in all modes of transportation, that can compete in a balanced marketplace and earn a fair return on their investment. Competitive and efficient carriers should be able to earn their cost of capital and attract investment dollars while providing real value to their customers. The railroads have, over the years, provided such value to DuPont and other customers. They have also, at times, acted in ways which harmed their customers and the economy. We are now in one of the latter periods.

When Congress passed the Staggers Act in 1980, there were over 40 Class I railroads competing for business. Today, after more than 50 mergers and consolidations, there are only seven Class I railroads in North America, and four of them control over 95 % of the railroad business. This unprecedented consolidation has resulted in entire states, regions, and industries becoming captive to a single railroad. This level of concentration and the lack of competition resulting in poor and unpredictable service and monopoly pricing were not envisioned by Congress when it reformed the applicable laws in 1980. Nor were they contemplated by companies such as DuPont.

Value is what DuPont and other rail customers expect from their supply chain participants. Value is reflected in the superior service that carriers would offer in a truly competitive environment. Value is continuous improvement and innovation. In the context of rail transportation, value is reliable, consistent transit times. Value is the delivery of services that keep customers competitive in the markets they serve. The inconsistency and lack of predictability in transit time that characterize rail service today translate into added cost and competitive <u>disadvantage.</u> They force shippers to add otherwise unnecessary (and expensive) rail cars to their fleets and to either hold more inventory at the point of manufacture or ship it into an already congested network. This increases costs for everyone and exacerbates the congestion problems that rail customers battle regularly and the carriers seek public funds to alleviate.

Congress also did not envision that captive rail customers would be left unprotected by the Surface Transportation Board ("STB"), the very agency charged with ensuring that the freight rail marketplace did not become the federally protected monopoly it is now. Rail customers who have sought the STB's assistance in helping them realize the fair play of competition, instead remain dependent on monopoly service. As a result, they have little if any redress for the non-responsiveness and mediocre service provided by the railroads at exorbitant prices. This is certainly the case for DuPont, which is captive at thirty-two out of thirty-nine U.S. rail shipping sites and at many of its customers' sites. The results are increased costs that make us less competitive, and unreliable transportation of raw materials and finished products into and out of our sites.

The potential impact of mediocre rail service and cost increases is illustrated by our experiences at the DuPont Spruance facility in Virginia. DuPont Spruance is our largest manufacturing facility in North America and employs more than 2,600 people. It is where we produce Kevlar®, the life-saving fiber used for body armor for our troops now in Iraq and Afghanistan, as well as by law enforcement personnel throughout the United States. DuPont is captive to CSX at Spruance – no other railroad serves the plant and there is no practical alternative form of transport for on-time delivery of raw materials into the facility. On several occasions during the past 15 months we have seen shipments of essential raw materials run more than 5 days late. While shutdowns were avoided through collaboration between DuPont and the railroad, we came uncomfortably close to delays that could hinder production. Mr. Chairman, as I am sure you and the other members of the Committee appreciate, any curtailment in production could lead to a shortage of body armor essential to our troops as well as subject DuPont to potential penalties under the Defense Production Act of 1950.

In addition to making DuPont extremely vulnerable to transportation delays at Spruance, the Company's captivity to one rail carrier there also threatens our competitiveness and increases the costs incurred by both local governments and the Federal government to acquire Kevlar®, Nomex® and Tyvek®, the third product made at the site. Recently, CSX increased the rates it charges DuPont to transport raw materials to Spruance by 9% to 102% depending on the specific move and product being transported. Although these increases bear no rational connection to the level of service being provided, DuPont had no alternative but to accept them and the consequent rise in the cost of goods sold to the U.S. military and law enforcement and fire protection agencies around the world. Those increases amount to over $2 million annually.

Ever-escalating rail rates without any commensurate cost improvement opportunities (such as faster and more consistent transit times) have driven companies out of certain businesses or forced them to seek lower cost solutions offshore. For example, a polyester fiber manufacturer in the southeastern United States has announced the closure of a plant that employs 260 people. DuPont supplied a raw material, ethylene glycol, for that plant. Recently, a carrier imposed a 42% increase in the rail rate to that captive destination. The added cost of inbound product would have increased the manufacturing cost, making this plant even less competitive when compared to offshore producers. Our customer will now import glycols from Taiwan and weave polyester fiber at another site. Two hundred and sixty workers at the plant lost their jobs, the community lost tax revenue, DuPont lost a customer, and the carrier that imposed a 42% rate increase lost 160 carloads of business each year.

Another DuPont customer located in Pennsylvania is similarly challenged to remain competitive versus imports. The customer manufactures a product essential to tire production. Its manufacturing facility is served by a short line railroad that connects with more than one

Class I rail carrier. However, the two DuPont plants from which we can ship to the customer are both captive to the same Class I railroad. Trucking is not a viable alternative for routine shipping of the regulated material involved. Recently, the Class I railroad increased the rate it charges DuPont to move the pertinent material by 78%, resulting in a $600,000 annual cost increase to our customer without any added value or benefit to anyone. As you know, the tire industry that remains in the United States is under severe competitive pressure from offshore producers despite the many recent press reports concerning quality and safety issues with imported tires. We must avoid another case where a company will shut its doors and our Nation will pay the price in lost jobs, a reduced tax and industrial base and increased trade deficit as more and more of the tires on our passenger cars and military vehicles are made abroad.

Carriers cannot claim ignorance concerning the specific potential impact of their price increases. During recent contract discussions, DuPont invited one of its carriers to business reviews with four of our strategic business units. During those reviews, DuPont presented data concerning the effect of proposed price increases on the business of DuPont and its customers, including the customer who ultimately shut down its plant. The extreme rate increases went forward unabated.

As the examples I have discussed demonstrate, the railroads are now prepared to take full advantage of their ability to impose monopolistic pricing even if they literally drive captive shippers like DuPont out of certain businesses. Developments since the enactment of the Staggers Act and its progeny confirm what my own experiences at DuPont suggest – that our economy would be better served by changing the current regulatory framework that enables the Class I railroads to operate as legally protected regional monopolies.

Congress enacted the Staggers Act because after the end of World War II, the nation’s privately owned and operated rail infrastructure was permitted to decline, costs related to inefficient work practices and poor infrastructure were extremely high, service had suffered and safety-related incidents were on the rise. Competition from motor carriage and waterborne competitors had increased and, in 1980, less than half of the Nation’s domestic freight traveled by rail. This contrasted markedly with figures which showed that in 1947 railroads were hauling three times as much tonnage as motor carriers.

Congressional concern was deepened by a 1978 Department of Transportation report to Congress which predicted that: “… the (rail) industry between 1976 and 1985 would have a capital shortfall of between 13.1 and 16.1 billion dollars ($16 to $20 billion in 1980 dollars)”. The House Committee on Interstate and Foreign Commerce, citing the Department’s report, concluded that: “There is no reason to believe that railroad, operating in the present regulatory environment will improve their earnings. Failure to overcome [this] … will mean a continued deterioration in the railroad service which will have the effect of driving more shippers away from railroads…”.

Congress concluded that the system had to change and, with the help of the rail community and industry, including DuPont, set out to accomplish that task. After considerable debate, Congress enacted the Staggers Act with the following stated goals:

(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;
(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;
(3) to assist the rail system to remain viable in the private sector of the economy, and
(4) to assist in the rehabilitation and financing of the rail system...

To help balance the new rights and protection afforded the railroads, Congress recognized the right of rail carriers and shippers to enter into contracts and provided for oversight of rail rates by the Interstate Commerce Commission (later replaced by the Surface Transportation Board).

It is clear that when it enacted the Staggers Act, Congress believed that existing competition between railroads and between modes of transportation would protect the consumer. The House Conference Report, which accompanied the Act, contains the following findings and rationale in support of the 1980 legislation:

> The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent the abuse of monopoly power by railroads and to maintain a national railroad network as an essential part of the nation's transportation system. However, today, most transportation is competitive and many of the Government regulations affecting railroads have become unnecessary and inefficient. Nearly two-thirds of inter-city freight is transported by modes of transportation other than railroads. Earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for the necessary capital improvements…. The industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy. Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads….

Times and the marketplace have changed and the issue now is whether the Staggers Act has accomplished its goals. Have the railroads been financially rehabilitated? Are they safer, more efficient, and economically stable? And, if the answers to these questions are positive, has the time come to reexamine the prerogatives afforded the rail community under the Act? Should the railroads continue to enjoy government "protection"? Or, should the rules and rigors of a competitive marketplace govern? And, what of the consumer, the user of railroad services? Will the marketplace protect the user or will the monopolistic behavior the railroads exhibited in the early 20th Century reassert itself? These are the questions the members of Congress will have to ponder. The answers lie in our history and in the changing conditions of the emerging global marketplace.

The rail industry has enjoyed a veritable rebirth as a result of the Staggers Act. Railroads, with the support of their customers and approval of the Interstate Commerce Commission, began to abandon unproductive track. Small, less productive segments with high costs and low productivity were sold to independent entrepreneurs. Labor negotiations resulted in substantially improved work rule changes and a dramatic reduction in the rail labor force. Poor and badly maintained cars and related equipment were removed from the system and customers were required to bear the cost of their replacement. The promise of improved service, greater efficiency and lower cost encouraged large rail customers to comply with these new capital requirements and to enter into long term contracts that created financial stability and brought predictability to rail balance sheets. Renewed faith by Wall Street, fostered by the passage of the Staggers Act, related work rules, and balance sheet improvements, brought capital to invest in new, more efficient locomotive power, communications and control equipment and to rehabilitate rail infrastructure. Finally, consolidation of the Nation's rail system into larger and larger Class I railroads resulted first in a more balanced of market place and later in the emergence of market dominance by an elite few.

The time has come to remove the protections afforded the rail industry by the ICC and its successor the STB. This is the time for Congress to bring more balance to the relationship between shippers – particularly captive shippers such as DuPont – and rail carriers.

By any measure, today's railroads are able to compete for capital without further governmental protection. Rail infrastructure of the Class I railroads is in better condition now than at any time in history. Rail service has stabilized although it is still inconsistent despite reported record profits for the Class I railroads. New equipment and technology hold the promise of still further productivity improvement. Earnings and the balance sheets of the Class I railroads – especially when adjusted for merger premiums – have never been better and compare favorably with those of their biggest competitor - the motor carrier industry.

Railroads have become "stocks of interest" and sophisticated investors are seeing them as having a very favorable upside for earnings. Warren Buffet, for example, has recently purchased large amounts of rail common stock, another indication of the railroad industry's favorable financial outlook.

In January 2007, Union Pacific announced that it would buy back 20 million common shares (or 7% of the company's 270 million outstanding shares) and increase its dividend payment to shareholders by 17%. Similarly, CSX reported that it would buy back an additional $1 billion dollars of shares to bring its current repurchase program to over $3 billion (or over 15% of the company's outstanding stock). CSX also announced an increase of 25% in its annual dividend. In at least some instances the railroads are spending more to repurchase stock than they invest in infrastructure. CSX, for example, is reportedly spending an aggregate of only $1.3

- $1.4 billion on infrastructure in calendar years 2006 and 2007, while it intends to reward investors with $3 billion through stock repurchases during the three-year period ending on December 31, 2008.

The railroads' attractiveness to sophisticated investors derives in part from their ability to impose unfair monopoly pricing. Morgan Stanley recently noted that based on favorable rulings on two rate cases filed before the Surface Transportation Board "rails have much more pricing upside left under current regulatory guidelines. Yet another pro-rail ruling will also leave shippers frustrated and more reluctant to pay the $5-6 million cost to file rate disputes with the STB…. We believe that rate case filings could slow from here, and captive rates will need to go much higher before reaching any regulatory limits under current guidelines." Morgan Stanley concluded that: "Railroad customers who cannot switch transportation modes acknowledged there is little they can do in the near term to combat rising railroad pricing and are thus planning for significant increases in railroad rates…" Similarly, in recent commentary (April 19, 2007), Bear Sterns analyst Ed Wolfe stated that: "Firm pricing despite signs of quickly weakening truck pricing is an important part of the rail story. CSX gave strong evidence that its pricing is holding up well. We don't expect our year EPS numbers for CSX or the sector to come down despite continued down year over year volumes into strong yields and improving productivity …." In the view of the markets, at least, the railroads are dominant monopolies unaffected by their nearest competition. What's more, it is reasonable to conclude, that the Class I railroads are able to freely dictate prices for their services without fear of interference by any regulatory agency.

But is this the end of the inquiry? Should the railroads be permitted to determine the fate of the industries they serve? Will they, through their monopolistic rate increases, cause manufacturing sites to close, mining to be curtailed and farmer's fields to be plowed under? Will their actions exacerbate the loss of well paying, U.S. manufacturing jobs and inhibit exports while enjoying monopoly profits?

The views of the investment community concerning the state of competition are confirmed by hard data. Recent trends support the proposition that the railroads of the 21^{st} Century bear a much closer resemblance to those of the early 20^{th} Century than to their less powerful cousins of the 1970's. In the late 1890's emerging industry, agricultural and mining interests were completely dependent on a single railroad system to transport their products to market. The robber barons of the time used this leverage to extract "monopoly profits" from the farmers, miners and other "captive" shippers of the day. The expected balance which competition brings to the market place was missing. Government intervention was required and the Interstate Commerce Act (passed in 1887, amended in 1902) and much of the current anti-trust law was enacted to help restore balance to the marketplace.

Today, the rail industry is highly concentrated. The forty plus Class I railroads that existed in 1980 have been reduced to a mere handful. The four largest effectively control different sections of the country and any real competition among them is essentially non-existent. In the chemical industry, for example, nearly two thirds of chemical shippers are now served by only one railroad. Further, due to the characteristics of the products or the economics of transporting the materials in bulk, no effective competition from motor carriage exists. A study by Escalation Consultants (2003) concluded that captive chemical customers pay, on average, rail rates that are 77% higher than rates for competitive chemical customers. The following chart illustrates the point:

	NS	CSX	BN	UP
Farm Products Captive Rate	$21.37	$36.74	$45.28	$37.99
Farm Products Non-Captive Rate	$11.88	$20.83	$26.09	$21.29
Coal Captive Rate	$17.56	$17.22	$16.77	$17.00
Coal Non-Captive Rate	$9.76	$9.76	$9.66	$9.53
	$36.98	$34.33	$42.57	$38.94
Chemicals Captive Rate	$20.56	$19.46	$24.52	$21.82
Chemicals Non-Captive Rate				
	$29.43	$36.13	$59.19	$59.49
Lumber or Wood Captive Rate	$16.36	$20.48	$34.10	$33.34
Lumber or Wood Non-Captive Rate				
Pulp, Paper Captive Rate	$39.48	$40.82	$62.14	$55.40
Pulp, Paper Non-Captive Rate	$21.95	$23.14	$35.80	$31.05

Source: Escalation Consultants (2003)

Additional competition from new entrants into the rail industry is highly unlikely. Current environmental rules, local ordinances and permits, land availability and cost, construction expense, and other constraints make the building of new competitive railroads virtually impossible.

Railroad dominance is even more severe in the agriculture and mining sectors than it is in my industry. In some cases, rail rates – imposed in the absence of competition and by dominant rail carriers – can determine which farmer, mining interest or manufacturer survives.

CSX President Michael Ward was quoted in Purchasing magazine as asserting that his company "only intends" to increase prices "up to 6%". DuPont has never objected to fair and reasonable rate increases provided they are tied to tangible service improvements. However, reasonable price increases is not what the Company is currently experiencing. DuPont is seeing significantly higher increases from all Class I railroads -- we have had no choice but to accept double, and in some cases triple digit increases to get our raw materials and products moved.

In today's global economy, competitive forces are accentuating the impact of cost inputs, including transportation. According to figures released by the American Chemistry Council, the chemistry sector of the U.S. economy went from a trade surplus of $20.4 billion in 1995 to a net import position of $9.0 billion in 2005. This is a reversal of U.S. production of almost $30 billion dollars in ten years. During this same time period, employment in the chemistry sector fell from 982,000 to 879,000, a loss of about 104,000 jobs. A May 2, 2005 Business Week article reported that: "… of 120 chemical plants being built around the world with price tags of $1 billion or more, just one … is in the United States. China, by contrast has 50."

While lost jobs and closed plants are not solely attributable to the market power exercised by the railroads, poor service, inflexibility and the railroads' exercising monopoly pricing power and the inflationary impact of their actions on the price of U.S. manufactured goods plays a significant role in the decision of many businesses to expand their operations overseas instead of the United States. For example, Toyota recently conditioned its decision to build an assembly plant in the United States on whether it would receive service from more than one railroad. Toyota indicated that it would not construct the new plant at a location in the United States unless it could be assured that it would not be become a "captive shipper" of a single rail provider.

The future, if current regulatory structures are maintained and past practices are permitted to continue, will bring an even greater concentration of rail power.

The current rail policy of the United States, as expressed in section 10101 of title 49 of the United States Code states, among other things, that:

> [I]is the policy of the United States Government – (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; and
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.

The STB is not currently recognizing and enforcing these provisions in its decisions. If these provisions are not recognized and enforced and if the rail industry is permitted to continue its current merger and pricing practices, these congressionally mandated policy goals will not be met. There will be no competition among rail carriers and rates will be permitted to exceed even the current monopoly levels.

Change is required and all realistic options must be considered. Congressional intervention is necessary to prevent the pendulum from returning to the 1900's. "Modernization of the economic regulation of the railroads", required in 1980, is again required. If DuPont and other manufacturers are to remain competitive in a global economy, Congress must repair our Nation's rail system and once again make it reliable, responsive, affordable and accountable.

First, reform must begin at the STB. Simply put, that agency has been ineffective and broken. While the STB is supposed to fairly mediate rate disputes between the railroads and shippers, available evidence suggests that the STB process is skewed in the railroads' favor.

In an October 2006 report, the Government Accountability Office concluded that the rate complaint process is largely inaccessible to shippers – even as the number of shippers eligible for relief has increased substantially as railroads have exercised their monopoly power. The fee for filing a large rate case at the STB is $178,200 compared to the $150 filing fee applicable in federal district court. The large rate case process is also far too lengthy and costly. The STB itself has recently indicated that it costs at least $4.5 million to litigate a case under the agency's large rate case rules, and large rate cases have required more than three years for a decision. The STB's own new rules for medium-sized cases state that such cases will require a year and a half and $1 million to litigate – far too long in a dynamic global economy and far too expensive.

The STB imposes an almost impossible burden of proof on rail customers. In "competitive access" cases (one of the pro-competitive changes made by the Staggers Act), that burden is so high that not a single case has been filed in the last eighteen years. The burden of proof on shippers filing large and medium-sized rate cases requires them to construct a hypothetical railroad and establish that the fees charged by such a railroad would be lower than the rates charged by the actual carrier. The difficulty in this burden can be shown in the results of the STB decisions. Over the past five years, of the ten large rate cases decided by the STB, eight have resulted in complete losses for the shipper. Even in the two cases in which the shipper obtained some relief, the measure of relief was far less than that sought – in one case a miniscule 1 to 3 percent reduction in the rate.

These burdens have made shippers extremely reluctant to file complaints. While the STB recently modified the process for large rate cases, rail customers believe that these changes are actually worse for them than prior rules. Indeed, two massive STB decisions issued just last week under the new large-case rules both resulted in complete losses for the shippers. The September 13, 2007, Coal and Energy Price Report stated: "[T]here is overwhelming sentiment among U.S. captive coal shippers that settling the ongoing rate issue over increasing rail rates will require more than appealing one's case to the Surface Transportation Board." The report continued: "People realize that they can't win with the current STB, so you have to take it back to Congress".

Many of the necessary reforms can be achieved through passage of H.R. 2125, the Railroad Competition and Service Improvement Act of 2007. DuPont actively supports H.R. 2125 as it seeks to preserve existing rail-to-rail competition in areas of the country where competition is working and looks to reduce impediments to competition that adversely affect us and other rail customers.

The so-called "bottleneck" issue illustrates the type of problem and inequity that H.R. 2125 is designed to correct. The STB has ruled that carriers are not required to facilitate competition to or from captive locations by offering a rate to the nearest interchange with another carrier. We suffer the ill-effects of this practice at our Niagara Falls, New York site where DuPont manufactures metallic sodium and ships it to customers along the Gulf coast and the Pacific Northwest. In a competitive scenario, CSXT, the only carrier with service to our plant, would be required to provide a rate for the 26 miles between our plant and the Norfolk Southern interchange in Buffalo, New York. Instead, we are forced to use CSXT to transport our shipments all the way to Chicago at much higher rates. DuPont is the only remaining producer of metallic sodium in the United States, yet we are at risk of losing this business to overseas competitors due in part to the high cost of captivity.

Among its numerous provisions, the proposed legislation would remedy the "bottleneck" problem and many of the other deficiencies at the STB. H.R. 2125 would require the agency to do what it was intended to do: promote effective competition among rail carriers at origins and destinations, enforce reasonable rates for rail customers in the absence of competition, and ensure efficient and reliable rail transportation service for all rail customers.

Second, while DuPont acknowledges that this legislation does not fall within this Committee's primary jurisdiction, we support enactment of H.R. 1650, The Railroad Antitrust Enforcement Act of 2007. We agree with the 17 state attorneys general who, on August 17, 2006, wrote to Congress urging enactment of legislation that would subject the railroads to the antitrust laws. As they noted, the "Surface Transportation Board has failed its responsibility to restrain railroad monopoly power," and some of the practices it allows are considered by the United States Department of Justice to be "of questionable legality under the nation's antitrust laws."[1] "Historically, our nation has found that the best way to ensure economic success and economic efficiency is through the discipline of competition."[2]

From time to time the courts and the Congress have granted various industries exemptions from specific applications of the antitrust laws. However, these exemptions are, in theory, issued sparingly and only when competitive markets are ensured through alternative means. Unfortunately, the American railroad industry has accumulated a very broad exemption from the nation's antitrust laws that shields the industry from antitrust enforcement even where competitive markets are not ensured through alternative means.

H.R. 1650 seeks to correct this imbalance by repealing the railroad exemptions in both the antitrust and transportation statutes, so that antitrust law fully covers railroads just as it covers other industries. Additionally, it permits the Justice Department and the Federal Trade Commission to review mergers under antitrust law, and allows state attorneys general and other private parties to sue for treble damages and sue for court orders to halt anti-competitive conduct, both of which are not currently allowable under federal law.

The major Class I railroads pushed for introduction of H.R. 2116, the Railroad Investment Tax Credit of 2007, to obtain a 25% federal investment tax credit and first year expensing provision for investments in railroad infrastructure. Some level of investment tax credit may be sound national policy, but only if it is part of a comprehensive solution to rail reliability problems and the overall infrastructure problems of the entire U.S. transportation industry. The railroads' desire for this tax credit may also give the Congress, for the first time in decades, an opportunity to address both the concerns of the major railroads and the legitimate concerns of rail customers in such a manner that a strengthened national rail system may emerge. DuPont believes that to be effective, any investment tax credit provided to the rail industry must be focused and must be coupled with provisions in H.R. 2125, H.R. 1650 and the overall solution to the national transportation infrastructure problems.

Individual shippers and carriers have cooperated in the past to structure a solution which enhances their collective interests and well-being and which supports the national interests. DuPont has participated in such efforts and is fully prepared to participate in them again. It is time for the rail industry to join with Congress and its customers to create a balanced, market based system serving the common interests of carriers, shippers and the country at large. It is essential that this be done and done quickly. We must start now.

In closing, Chairman Oberstar, I want to thank you and the members of the committee for allowing me to share my Company's views on this important issue. We look forward to joining you in creating a legislative and regulatory framework that will help build a truly competitive transportation and supportive network – including a rail system - that will add value to United States' chemical, manufacturing, mining, energy and agricultural industries, provide jobs to our citizens and permit us to continue to compete and grow in the global marketplace. DuPont appreciates the important work of this Committee and we stand ready to work with you as you move forward.

---

[1] A Communication from the State Attorneys General of Arizona, Arkansas, California, Connecticut, the District of Columbia, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota and Wisconsin to the Judiciary Committees of the U.S. Senate and House of Representatives in Support of H.R. 3318 and S. 3612, Applying the Nation's Antitrust Laws to Railroads, August 17, 2006.

[2] Id.